372 Nos. 678-679 PITTSBURGH
MAY 5 1941
ABSENT

IN THE

SUPERIOR COURT OF PENNSYLVANIA

Harrisburg District

MARCH TERM, 1941. No. 37.

COMMONWEALTH OF PENNSYLVANIA,

VS.

GEORGE E. CRANDALL,

Appellant.

Brief for Appellee

Appeal from Sentence of the Court of Quarter Sessions of York County, Pennsylvania, as of No. 43 August Session, 1940, Refusing Motion for New Trial.

JOHN E. BRENNEMAN,
District Attorney,
HAROLD B. RUDISILL,
Assistant District Attorney.

Court House,
York, Pennsylvania.

The Riverside Press, Athens, Pa., Henry C. Kessler, York County Rep., Court House, York, Pennsylvania.

INDEX

	PAGE
Counter-Statement of the Questions Involved	1
Counter-History of the Case	2
Argument	4

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Did the learned Court below abuse its discretion in refusing defendant's motion for a new trial on the grounds that he was deprived of his constitutional rights and denied a fair trial?

2. Did the learned Court below abuse its discretion in refusing defendant's petition to alter and amend the record?

COUNTER-HISTORY OF THE CASE

This is an appeal from the refusal of the Court of Quarter Sessions of the Peace of York County, Pennsylvania, to grant a new trial.

On March 11, 1940 the defendant, George E. Crandall was arrested on the charge of holding himself out as a practitioner of medicine and surgery, without first having received a Certificate of Licensure from the Bureau of Medical Education and Licensure. He gave bail for his appearance at a preliminary hearing which was held April 12, 1940. After the hearing the defendant was held for the August Sessions of the Quarter Sessions Court and gave bail for his appearance. The defendant was represented by Counsel at the preliminary hearing.

On August 28, 1940 the case was submitted to the Grand Jury and a true bill found. On August 29, 1940, the defendant, by his Counsel requested a continuance of the case, which request was refused with the direction that the case be called on the following morning, August 30, 1940.

When the case was called for trial on August 30, 1940 at 9:30 A. M. the defendant appeared without Counsel and the Court offered to appoint two attorneys to represent the defendant which offer of the Court was refused by the defendant who stated "Your Honor, I have to beg to refuse Counsel and exercise my prerogative of acting as my own at-

torney. I cannot accept Counsel." The case proceeded to trial with the defendant acting as his own attorney. After hearing the case the Jury returned a verdict of "guilty". On September 3, 1940 the defendant filed his motion for a new trial, which motion was refused by the Court after argument had on the said motion.

ARGUMENT

The Appellant complains that the Court below erred in not granting defendant's request for a continuance. The record discloses that the defendant was arrested on March 11, 1940, and that a preliminary hearing was held on April 12, 1940, at the conclusion of which he gave bail for his appearance at the August Sessions of the Quarter Sessions Court. Thus it is seen that the defendant had over five months to prepare his case.

The Superior Court has said in *Commonwealth vs. Rouchie, et al.*, 135 Pa. Super. 594, 600, that the all important question is the time allowed defendant himself, and not the interval between appointment of counsel and the date of the trial.

Commonwealth vs. Meyers, 290 Pa. 573, 578;

Commonwealth vs. Lockard, 325 Pa. 56, 62.

In the case of the *Commonwealth vs. Rouchie*, supra, the information was filed against the defendant on December 30, 1938, and a preliminary hearing was held on January 25, 1939. The indictment was returned February 9, 1939, and a motion for continuance filed February 14, 1939, which was refused the same day and the trial began February 15, 1939.

In the instant case the defendant had even more time than in the case of *Commonwealth vs. Rouchie, et al.*, supra. And in this, as in that case, there

was no motion supported by affidavit showing any facts warranting a continuance nor was there any evidence to show that five months was not sufficient time to prepare a defense.

An application for a continuance is addressed to the sound discretion of the trial judge, and his action will not be disturbed unless that discretion has been abused.

Commonwealth vs. Rouchie, et al., 135 Pa. Super. 594, 599;

Commonwealth vs. Deni, 317 Pa. 289, 293;

Commonwealth vs. Meyers, 290 Pa. 573;

Commonwealth vs. Blakeley, 274 Pa. 100, 104;

Commonwealth vs. Zec, 262 Pa. 251, 255;

Commonwealth vs. Scouton, 20 Pa. Super. 503, 517.

A defendant has no natural or inalienable right to a continuance.

Commonwealth vs. Meyers, 290 Pa. 573;

Commonwealth vs. Blakeley, 274 Pa. 100, 104.

The defendant takes the position that he was not formally arraigned. This case is not one triable solely in the Oyer and Terminer and therefore, arraignment was not necessary.

Act of May 15, 1895, P. L. 71;

Commonwealth vs. Ferguson, 44 Pa. Super. 626, 630.

The fourth assignment of error relates to the trial of the defendant without the assistance of counsel.

The Commonwealth contends that there was no denial to defendant of the constitutional right to be heard by his counsel because the defendant WAIVED this right.

The waiver was made in open Court, on the record, and defendant fully aware of the effect of his voluntary act. (See Record page 19a).

When defendant appeared before the Court on the day appointed for trial without counsel, the learned Court appointed two members of the Bar to assist and represent him. (See Record page 19a).

The defendant however, refused this offer of assistance stating as follows:

> "Your Honor, I have to beg to refuse counsel and exercise my prerogative of acting as my own attorney. I cannot accept counsel." (Record page 19a).

It is difficult to see how the defendant could have more clearly evidenced his intention of waiving his right to counsel.

Johnson vs. Zerbst, 304 U. S. 458;

Commonwealth ex rel. Shultz vs. Smith, 139 Pa. Super. 357;

Commonwealth vs. Jester, 256 Pa. 441.

The Supreme Court of the United States has defined a waiver as follows:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of accused".
>
> *Johnson vs. Zerbst*, 304 U. S. 458, 465.

That a defendant in a criminal case may waive his right to the assistance of counsel is well settled,

> *Johnson vs. Zerbst*, supra, 304 U. S. 465;
>
> *Commonwealth vs. Jester*, supra;

and whether or not the accused has actually waived his right is a matter for the trial Court,

> *Johnson vs. Zerbst*, supra;
>
> *Commonwealth ex rel. Shultz vs. Smith*, supra;

whose decision in the matter will not be reversed except for abuse of discretion.

> *Commonwealth ex rel. Shultz vs. Smith*, supra.

It is contended by the Commonwealth that the learned trial judge did not abuse his discretion. The relevant circumstances of this case manifest that the defendant was fully aware of his rights and deliberately chose to waive them. He was ar-

rested over five months prior to his trial, and was freed on bail for action of the August Term of the Court after a preliminary hearing at which he had counsel. (See Record pages 5a and 13a). He knew for over five months that his case was to be before the Court in the August Sessions. Accused is an intelligent individual, a graduate of an Osteopathic College, and for years maintained and presided over an institution for the care of the sick. The charges, he knew, grew out of and were concerned with this very institution.

The Commonwealth had procured the presence of witnesses, some from distant sections of the State, for the term of Court for which defendant was held by the Alderman as a result of the preliminary hearing.

Under these circumstances, the accused cannot be heard to say he did not voluntarily and of his own accord determine that he desired to proceed to trial without counsel.

Such being the fact, the learned Court below properly permitted the trial to proceed. In fact the Court would not have been justified in imposing counsel on the defendant against his will.

14 Ann. Jurisprudence, 884 Sec. 169;

State vs. Townley, 149 Minn. 5, 182 N. W. 773;

17 ALR 253, Writ of Certiorari denied, 257 U. S. 643, 66 L. Ed. 413.

The learned Court therefore did not err in finding that the defendant waived his right to counsel.

The sixth, seventh and eighth assignments of error relate to the refusal of the learned Court to enlarge and correct the record.

It is contended that there is no merit to these assignments. The record as compiled is complete and shows that the defendant did receive a fair trial. The assignments, however, charge that the Court below made up a false record. This charge is refuted by the record itself.

Krug vs. Peale, 35 Pa. Super. 1, 9.

The only way these assignments of error could be sustained would be to impeach the record and attack the veracity of the trial judge.

Doylestown Distilling Company's Application, 9 Pa. Super. 96, 99.

In the *Doylestown Case* supra, the Superior Court stated, at page 99:

> "We have said enough to show that the assignments of error cannot be sustained without impeaching the record, which, of course, we cannot do."

In the *Krug Case*, supra, the Superior Court stated in reference to Appellant's charge that the record was not a true one as follows:

> "We are now asked to convict him (the trial judge) of the palpable disregard of his duty on the assertion and argument of the learned counsel for the defendant. This we cannot do."

See also *Dental Mfgr. Supply Co. vs. Southern Ry. Co.*, 82 Pa. Super. 558, 561 where it is held that "generally speaking the trial judge is the ultimate

arbiter as to what constitutes the record". It is submitted that the learned Court properly exercised his judicial function in refusing defendant's rule to "enlarge and correct" the record.

The ninth assignment of error cannot have any merit. The defendant having waived his right to counsel, cannot allege what counsel would have done had he had counsel. Furthermore, the record discloses that the defendant's rights were adequately safeguarded by the trial judge.

Defendant in his brief (page 12) attacks his conviction of "unlawfully operating a hospital or private nursing home". But nowhere does defendant assign as error his conviction under this count except by inference in those assignments wherein he complains that he was denied a fair trial and was deprived of his constitutional rights. No assignment of error based on the Court's charge in reference to this offense is made by defendant. (See Assignments of Error, Appellant's Brief, pages 4 to 8 inclusive.) The record discloses that there was abundant testimony to support defendant's conviction on this charge, and it is submitted that what is said in Appellee's Argument in refutation of the assertions concerning a fair trial apply to this further contention of the defendant.

The Court in the exercise of its discretion may order two or more separate indictments against the same defendant to be tried at the same time.

2 Sadder Criminal Procedure in Pennsylsylvania, 2nd Ed. Section 518, 580;

Commonwealth vs. Egan, 113 Pa. Super. 375, 384.

It therefore is respectfully submitted that the judgment of the learned Court below be affirmed.

Respectfully submitted,

JOHN E. BRENNEMAN,
District Attorney,
HAROLD B. RUDISILL,
Assistant District Attorney,
Attorneys for Appellee.

Certificate

We hereby certify that the cases herein cited from other than the Official Reports of the Supreme and Superior Courts of Pennsylvania, are not reported therein.

JOHN E. BRENNEMAN,
HAROLD B. RUDISILL,
Attorneys for Appellee.